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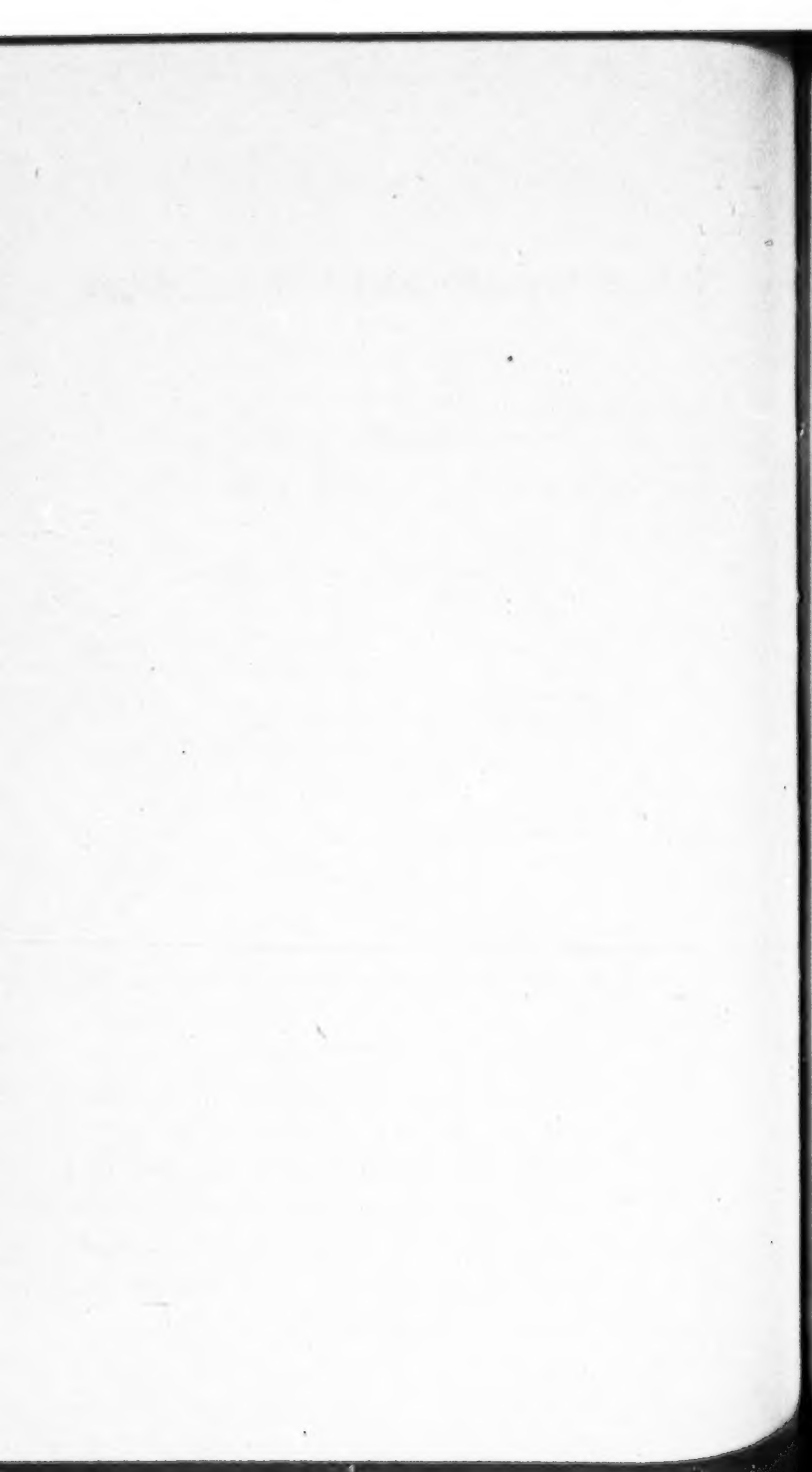
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# **In the Supreme Court of the United States**

OCTOBER TERM, 1947

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No. 659

BERNARD G. BRENNAN Co., PETITIONER

v.

THE UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINIONS BELOW**

The opinion of the Circuit Court of Appeals (R. 76-82) is reported at 165 F. 2d 500. The findings of fact and conclusions of law of the District Court (R. 51-53) are reported at 63 F. Supp. 106.

## **JURISDICTION**

The judgment of the Circuit Court of Appeals (R. 83) was entered on December 18, 1947. The petition for a writ of certiorari was filed on March 8, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

Whether the taxpayer established, as required by Section 902 of the Revenue Act of 1936, that it bore the burden of the floor stock taxes which it seeks to recover.

**STATUTES AND REGULATIONS INVOLVED**

The pertinent provisions of the statutes and Treasury Regulations involved are printed in the Appendix, *infra*, pp. 8-10.

**STATEMENT**

This is a suit against the United States under Title VII of the Revenue Act of 1936, c. 690, 49 Stat. 1648, Sections 901 to 916, inclusive, for refund of amounts paid as floor stock taxes under the Agricultural Adjustment Act, c. 25, 48 Stat. 31. The Commissioner denied the claim for refund on the ground that the taxpayer had not established that it had borne the burden of the tax as required by Section 902 of the 1936 Act. In its answer (R. 9) to the complaint filed in the District Court (R. 2-8), the United States denied substantially all of the allegations of the complaint, and as a further defense alleged that the plaintiff had failed to comply with the requirements of Section 903 of the Revenue Act of 1936, with respect to the filing of a claim for refund of the amount sued for.

The evidence in the case consists of a stipulation of facts (R. 19-22), an admission of facts

and of the genuineness of documents submitted by the taxpayer (R. 11, 12-18), and certain oral testimony (R. 27-49). The findings of the District Court (R. 51-52) based on this evidence are, briefly, that the petitioner, Bernard G. Brennan Company (herein sometimes referred to as the taxpayer), an Illinois corporation, is engaged in the business of meat packing, with its principal office and place of business at Chicago, Illinois. On January 29, 1934, and April 2, 1934, the taxpayer paid to the Collector of Internal Revenue the respective sums of \$81,998.42 and \$136.86 as floor stocks taxes on hogs and hog products under the Agricultural Adjustment Act. Of the total amount thus paid by the taxpayer, the Government refunded to it the sum of \$2,194.86, and the taxpayer was reimbursed by its vendees to the extent of \$3,565.60. (R. 51-52.)

On June 30, 1937, the taxpayer filed a claim for refund of \$77,232.06 of these floor stocks taxes, alleging as a ground for refund that it had at all times sold its commodities at prevailing market prices.<sup>1</sup> On December 16, 1939, the taxpayer filed an amended claim for the refund of \$77,232.06 which included, as evidence that the taxpayer had not shifted the burden of the tax, a comparison of the taxpayer's prices at the time of the imposition of the tax and its prices in the period

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<sup>1</sup> See Exhibit A attached to the complaint but omitted from the printed record by agreement. (R. 69.)

during which the inventory upon which the tax had been assessed was sold.<sup>2</sup> (R. 52.)

At all times before and after the imposition of the floor stocks tax in question, the taxpayer sold its pork products at prevailing market prices. On November 5, 1933, the date of the imposition of the floor stocks tax, the market prices at which the taxpayer sold its products were increased by the amount of the tax. (R. 52.)

The District Court then found: "The plaintiff has failed to prove that it absorbed the burden of the floor stocks tax." (R. 52.) Further, it concluded as a matter of law that (R. 53):

1. The claim for refund does not comply with the provisions of section 903 of the Revenue Act of 1936 because it contains no evidence from which it can be determined whether or not the plaintiff shifted the economic burden of the tax.

The court below affirmed the decision of the District Court. (R. 83.) Its opinion contains no explicit reference to the jurisdictional problem, but does state that the court's prior decision in *Cudahy Packing Co. v. United States*, 152 F. 2d 831, certiorari denied, 328 U. S. 849, which rested on both the burden of proof and the jurisdictional ground, is controlling.

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<sup>2</sup> See Exhibit B attached to the complaint but omitted from the printed record by agreement. (R. 69.)

## ARGUMENT

The Circuit Court of Appeals correctly decided that the District Court was right in dismissing the taxpayer's complaint for failure of proof. The burden was upon the taxpayer to establish to the satisfaction of the trial court that it had borne the burden of the tax which it sought to recover. Section 902 of the Revenue Act of 1936 (Appendix, *infra*, pp. 8-9); *Webre Steib Co. v. Commissioner*, 324 U. S. 164, 171. The trial court found that on the date of the imposition of the floor stock tax, the market prices at which the taxpayer sold its hog products were increased by the amount of the tax. (R. 52.) The Circuit Court of Appeals held that this finding was supported by the evidence (R. 82), and that the taxpayer had failed to prove that the subsequent reduction in price was other than a general and natural decline due in no wise to the alleged fact that "plaintiff lifted the amount of the tax from said commodities." Consequently, it sustained the District Court's finding (R. 52) that the taxpayer had failed to prove that it had absorbed the burden of the tax.

There is no merit to the taxpayer's assertion that this decision is in conflict with *United States v. Cheek*, 126 F. 2d 1 (C. C. A. 6th); *United States v. Root & McBride Co.*, 136 F. 2d 907 (C. C. A. 6th); *Interwoven Stocking Co. v. United States*, 144 F. 2d 768 (C. C. A. 3d); *United*

*States v. Arkwright Mills*, 139 F. 2d 454 (O. C. A. 4th); *Colonial Milling Co. v. Commissioner*, 132 F. 2d 505 (C. C. A. 6th), certiorari denied, 318 U. S. 780, or with the lower court's own earlier decision in *C. B. Cones & Son Mfg. Co. v. United States*, 123 F. 2d 530. As the court below pointed out (R. 79), the question of whether or not the tax involved was shifted is a question of fact. It must be determined in each case on the basis of the evidence submitted. In each of the above cases, with the exception of *C. B. Cones & Son Mfg. Co. v. United States*, *supra*, the appellate court merely held that the evidence was sufficient to support the finding of the trial court. The *C. B. Cones* case, which is of doubtful correctness, was decided by the court below and cannot be considered a conflict. In any event, it is plainly distinguishable on its facts.

Nor is there any merit to the taxpayer's assertion that the decision below is contrary to the decisions of this Court in *Galloway v. United States*, 319 U. S. 372; *United States v. Spaulding*, 293 U. S. 498; *National Bank of Washington v. Texas*, 20 Wall. 72, or that it is in conflict with *Franklin Peanut Co. v. Commissioner*, 144 F. 2d 979 (C. C. A. 4th), certiorari denied, 324 U. S. 867. The assertion is based upon the assumption that here the court below permitted the consideration of opinion evidence to refute definitely ascertained and tangible facts. But since the taxpayer's evidence failed to sustain its contention that the price de-



cline was attributable to its assumption of the tax, it in no way contradicted the Government's opinion evidence; thus the cases cited by the taxpayer are not apropos.

The taxpayer has cited no decision, and we know of none, which holds that the evidence relied upon by it requires a finding that it bore the burden of the tax, even in the absence of the rebuttal evidence introduced in this case.

Finally, the decision below is not in conflict with, but on the contrary is in accord with, the decision of this Court in *Anniston Mfg. Co. v. Davis*, 301 U. S. 337. Lack of available evidence may create a hardship in a particular case, but it does not relieve the taxpayer of his burden of proof. *Burnet v. Houston*, 283 U. S. 223, 228.

#### CONCLUSION

The decision below is correct. It is supported by the facts and the law and is not in conflict with any other decision. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1948.

## APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

### SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed

therefor, or may shift the burden thereof;  
or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

(7 U. S. C. 1940 ed., Sec. 644.)

SEC. 903 [as amended by Section 405, Revenue Act of 1939, c. 247, 53 Stat. 862].  
FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

(7 U. S. C. 1940 ed., Sec. 645.)

Treasury Regulations 96, promulgated under the Revenue Act of 1936:

ART. 202. FACTS AND EVIDENCE IN SUPPORT OF CLAIM.—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.